

To Whom It May Concern:

As an apartment resident, Internet Service Provider charges have undoubtedly gotten out of control, and anticompetitive techniques such as those named in the Notice of Proposed Rulemaking (revenue sharing agreements and exclusive wiring, marketing and other arrangements) are undoubtedly the driving factor. In just two years, my monthly Internet bill has gone from \$29.99 with a small ISP, to \$59.99 with a large ISP that pushed out the small ISP in my apartment complex. Although I was able to reduce this rate to \$49.99 by accepting lower bandwidth, apartment residents are truly paying more for lower quality service. I have no idea why our apartment complex would make this switch except if it were receiving some form of consideration from the large ISP for providing it with a captive audience to force to pay more for less. It is also telling that the small ISP withdrew at the same time that the large ISP moved in and that the two ISPs were not allowed to coexist.

In my view, the sole issue is not the “deployment” of broadband. Indeed, the Pew Research Center estimates that three quarters of American adults have broadband at home.¹ Instead, the issue is also the price that Americans have to pay for their existing broadband, which is affected by the level of competition generally, and by MTEs’ use of anticompetitive techniques more specifically. While anticompetitive techniques such as exclusive wiring arrangements may allow ISPs to secure funding to move into new developments or encourage them as to the economic feasibility of investing in a new development, this comes at a cost to residents of MTEs who could be feasibly served by multiple competing ISPs, but whose landlords are permitted to deal exclusively with, and extract rent from, a single ISP. Indeed, the

¹ <https://www.pewinternet.org/fact-sheet/internet-broadband/>

expansion of high-speed broadband “access” through anticompetitive techniques will be a hollow victory indeed, as consumers such as myself opt instead for lower-cost, lower-speed plans, albeit still at a higher price than we would pay for higher-speed plans in a competitive market.

Detailed reporting by Wired Magazine,² among others, establishes that large ISPs have become adept at circumventing the FCC’s previous efforts to promote competition among ISPs in the MTE context. One exemplary passage: “The FCC’s rule is nonsensical. They’re saying you can’t have exclusive agreements, but, at the same time, a landlord gets to say yes or no to anyone coming into the building, and you have to have the landlord’s permission. So, a landlord certainly can sign an agreement with one company and say ‘No’ to everybody else, thereby creating an exclusive agreement. So that’s what they do. They’re under no obligation to let everyone in, so they’ll extract a rent payment from one provider.” Other techniques include convoluted sale-leaseback schemes involving the wiring. Another pertinent passage from Wired: “FCC long ago created ‘inside wiring’ rules giving power to MDU owners, under certain circumstances, to take ownership of wires run by cable companies inside their buildings. The commission recognized that the wiring infrastructure inside an MDU gives the incumbent an unbeatable advantage, and wanted to open up that infrastructure to competition. But those rules were based on the (apparently naive) assumption that, initially, the cable/telco company owned the wires. Clever Time Warner Cable lawyers and many others have worked around this by deeding ownership to their inside wires to the building owner, and then getting an exclusive license back from the owner to use those wires.”

² <https://www.wired.com/2016/06/the-new-payola-deals-landlords-cut-with-internet-providers/>

The FCC emphatically should restrict the use of revenue sharing agreements and exclusive wiring and marketing arrangements. In fact, the FCC already largely has, only to be undone by hypertechnical interpretations of the rules that would probably be rejected in other legal contexts as prioritizing “form over substance.” The FCC should stand by its reasoning from prior rulemakings and simply close the alleged gaps. Indeed, the FCC has previously stated, “We conclude that exclusive agreements to provide telecommunications services to residential customers in MTEs harm competition and consumers without evidence of countervailing benefits, and we thus prohibit carriers from entering into or enforcing such provisions. This conclusion is bolstered by our decision in the Video Nonexclusivity Order to prohibit cable operators and others subject to the relevant statutory provisions from executing or enforcing existing video exclusivity provisions in contracts to serve residential multiunit premises.”³ Moreover, even if restricting revenue sharing and exclusive wiring arrangements could lead to some lowered investment, the Commission needs to seriously consider the narrower alternative of allowing such exclusive agreements only in designated areas of particularly low broadband penetration. A blanket allowance of anticompetitive techniques in areas that are already saturated in existing high-speed broadband infrastructure facilitates only rent-seeking and does not inhibit the provision of reasonable Internet service in any way.

It might be true that small ISPs such as Blue Top Communications cannot “hack it” without the use of anticompetitive techniques. But this only shows that the business model of small ISPs may be flawed or inefficient in today’s competitive environment, or that small ISPs may need to offer superior service to justify the possibly higher prices that they may need to

³https://www.nmhc.org/uploadedFiles/Articles/Final_Legislation_and_Regulation/FCC%20Exclusive%20Telecom%20Contracts%20Ban.PDF

charge. MTE residents would likely welcome competition even among only the large providers who have the means to finance their own new projects. It is not essential to competition that small ISPs be accommodated in every instance. Competition among large ISPs would also go a long way toward driving down prices. And again, perhaps the Commission should consider the alternative of allowing such exclusive agreements only in areas with low broadband penetration.

I hope that the Commission will make its prior restrictions on exclusive agreements more meaningful by responding to the ways that ISPs have abused and circumvented them, not losing sight of the fact that the prevention of rent-seeking behavior can coexist with expanding broadband access.

Sincerely,

Jacob Donnelly